Bay Electric, Inc. *and* International Brotherhood of Electrical Workers, Local No. 567, AFL–CIO. Cases 1–CA–31620 and 1–CA–32903

February 27, 1997

DECISION AND ORDER

BY MEMBERS BROWNING, FOX, AND HIGGINS

On July 3, 1996, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified, and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and the complaint is dismissed.

[1] We adopt the judge's finding that the Respondent did not, as alleged, violate Sec. 8(a)(3) of the Act by refusing to consider for hire Ben Nest and by refusing to consider for hire or to hire Sidney Smith, during the 60-day period between September 24, 1993, and November 23, 1993, when their applications were active (as provided on the face of the applications). There was no showing that the Respondent was hiring during those 60 days. Thus, the General Counsel failed to establish that there was any unlawful conduct at any time during that period. In light of the General Counsel's failure to establish a prima facie case, we find it unnecessary to pass on whether the charge was barred by Sec. 10(b). Similarly, there is insufficient evidence to establish that the Respondent's hiring policy requiring individuals to apply in person for posted job openings and keeping applications active for 60 days was discriminatorily applied or promulgated to discourage union activity. Accordingly, we also find it unnecessary to determine whether this charge was barred by Sec. 10(b).

Joe Griffin, Esq., for the General Counsel.
Peter R. Kraft and *Lawrence C. Winger, Esqs.*, of Portland, Maine, for the Respondent.
Gene A. Ellis, Esq., of Falmouth, Maine, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Boston, Massachusetts, on March 28, 1996, on the General Counsel's complaint which alleged that the Respondent refused to consider three applicants for employment because of their union affiliation and thus violated Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 151, et seq. It is also alleged that the Respondent promulgated a change in its hiring procedure in violation of Section 8(a)(1) of the Act.

The Respondent generally denied that it committed any violations of the Act.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Maine corporation engaged in business as an electrical contractor, in the conduct of which it annually provides services valued in excess of $50,000 for employers which are directly engaged in interstate commerce. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, Local Union No. 567, AFL–CIO is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Case 1–CA–31620*

1. The facts

This case involves the alleged refusal by the Respondent to hire or consider for hire, Benjamin Nest, an organizer for the Union, and Sidney Smith, the business manager and organizer for the Union's sister local No. 119.

On September 24, 1993, Nest and Smith appeared at the Respondent's office and presented applications for employment to Gary Stockson, an individual who had some office responsibilities but who primarily did bargaining unit work as an electricians helper.[1] On that day Nest also sent a letter on the Union's stationary to the Respondent's owner, Don O. Mailman:

> I am forwarding my resume for your consideration as per my discussions with Mr. Stockson. I also have obtained a referral from the Maine Job Service. Please consider my qualifications as they are extensive. If hired I will be organizing as protected under Section 7 of the National Labor Relations Act. I am willing to work under the same terms and conditions offered others.

On November 15, Nest wrote Mailman another letter sending the resumes of 13 unnamed individuals and asked they be considered for employment and stating if hired they would be organizing "as protected under section 7 of the National labor Relations Act. [Sic.]" There is no indication who the 13 individuals were or whether Nest was one of

[1] Decision and Direction of Election dated April 12, 1994, in Case 1–RD–1754.

them. Mailman testified that he did not know and Nest was not called as a witness.

The charge in Case 1–CA–31620 was filed on April 22, 1994, naming as discriminatees Nest, Smith, Keith Hillock, and Gene Ellis. Inasmuch as the filing date was more than 6 months after Nest and Smith filed applications for employment, at the hearing counsel for the Respondent stated there was a 10(b) issue.

For some years the Respondent had had a collective-bargaining relationship with the Union as a member of an association. Though unclear from the record, it appears that this relationship ended. In any event, on October 28, 1993, a decertification petition was filed by Stockson.[2] There was an election, but the ballots have remained sealed, presumably awaiting the outcome of this case.

2. Analysis and concluding findings

The violations alleged in this complaint are predicated on an initial finding that Nest and Smith applied for jobs. Only if they were applicants for employment could there be an issue of whether the Respondent's failure to hire or consider them was unlawful. Only then would it appropriate to consider the inferences suggested by the General Counsel, such as Nest and Smith were not hired because a decertification petition was pending and "the last two people you want employed are union organizers when you know you're trying to get rid of the union."

While Nest and Smith did file applications, such occurred more than 6 months prior to the filing of the charge. The Respondent therefore argues that as to those applications, Section 10(b) is a bar. The General Counsel makes no argument concerning this issue, apparently relying on some kind of a continuing application theory that once an individual applies for a job, whether or not a job is available at the time, he continues to be an applicant in perpetuity, or at least for some unspecified period. I find no basis for such a conclusion.

The mere fact that neither Nest nor Smith was considered for employment nor hired in the 6 months preceding the charge here does not establish an unfair labor practice. The nonconduct of the Respondent cannot be actionable absent a predicate that they offered themselves for employment and the only evidence of such occurred more than 6 months prior to the charge. Therefore, to find a violation here would require relying on pre-10(b) events and such is not permitted. *Machinists Local 1424 v. NLRB*, 362 U.S. 411 (1960). To find a violation here would be "inescapably grounded on events predating the limitations period." Id. at 422.

Unlike cases where pre-10(b) activity is considered to "shed light on the true character of matters occurring within the limitations period." Id. at 416, here there was no conduct within the 10(b) period. The General Counsel does not explain how the Respondent's inaction is unlawful without considering the events of September 24. How can it be an unfair labor practice not to hire, or consider for hire, someone who has not applied for a job?

In short, I conclude that the General Counsel presented no evidence that either Nest or Smith applied for a job with the Respondent within months of the charge here. C.f. *Grimmway Farms*, 314 NLRB 73 (1994), where the Board found all the elements establishing a prima facie case occurred within the 10(b) period including the fact that the company was hiring, the alleged discriminatees filed applications and were denied jobs.

Although the Respondent did not plead the 10(b) defense, which is typically required, *Hydro Logistics, Inc.*, 287 NLRB 602 (1966), as in *Consolidation Coal Co.*, 277 NLRB 545 (1985), the complaint anticipated the 10(b) defense by alleging that the Respondent refused to consider or hire Nest and Smith since October 22, 1993. During the hearing, counsel for the Respondent stated that 10(b) was an issue. In their brief, counsel for the Respondent "specifically objects to this claim under Section 10(b) of the Act." Therefore, I conclude that the 10(b) issue was litigated and not waived.

There is little doubt that had Nest applied for an existing job opening, he would not have been considered. Mailman credibly testified that he "wouldn't hire Benny Nest if he was the last electrician in the world." According to Mailman, this was based personal animosity and dislike and not on any activity of Nest protected by the Act.

An employer does not have to consider for hire everyone who files an application, much less those who do not. An employer is required only not to base consideration or hiring decisions on the individual's union or other protected activity. The General Counsel failed to prove that the Respondent in fact discriminated against Nest and Smith based on their protected activity. I shall therefore recommend dismissal of Case 1–CA–31620.

Additionally, I note that the Smith application, by its terms, "is current for only (60) days" after which, if not contacted by the employer, "it will be necessary for me to fill out a new application." The Nest application is identical, except it is missing the signature page, which includes these caveats. Thus even if Nest and Smith can be considered applicants because they had active applications with the Respondent during the 10(b) period, from the credible testimony of Mailman I find there were no job openings between October 22 and November 23.

B. *Case 1–CA–32903*

1. The facts

Gene Ellis worked for the Respondent as a journeyman electrician about 4-1/2 years until July 1990. At that time he was laid off when a project ended. However, he had become emotionally incapable of working alone or with live voltages as a result of burns to his hands and face received on April 3, 1989, while working with live and very dangerous voltage. According to his testimony, and workman's compensation interrogatories, the emotional stress from these injuries increased until he was incapable of work for about 9 weeks from December 1989 to February 1990. He did return to work for the Respondent but continued to have problems until the time of his layoff.

Subsequent to this, Ellis was hired as a full-time employee of the Union. In September 1994, Ellis returned to the Respondent's office for the first time since his termination and spoke to Mailman. Their conversation was friendly and according to Ellis, "innocuous." During this Ellis asked if Mailman was hiring and Mailman said he was not. Ellis did not ask for a job.

[2] Ibid.

Ellis returned on January 30, 1995, and again talked to Mailman, asking if he was hiring and Mailman said he was not. Ellis wore a tape recorder and the Respondent offered into evidence the tape and transcript of this and two subsequent visits.[3] This was a friendly meeting between Mailman and Ellis at the beginning of which Mailman commented on how "sharp" Ellis looked and that "life must be treating you pretty good." Ellis responded, "Well, you know I love my job." After a few comments about the Union and Ellis' job (as an organizer), Ellis said, "I was just wondering if you were looking to hire at all." Mailman responded, "We're not hiring anybody right now."

Ellis never asked for a job or an application. Nor did he do so in the subsequent visits. Thus, he testified, on March 10 he stopped by and talked to Stockson, asked if Mailman was around (he was not) and said, "Well, I just stopped in to say hi and to see if there was any work." Ellis returned on April 28, talked to Mailman and said, "You're not hiring anyone at all?" and Mailman said, "No, no."

On September 14 and 15, Ellis again came to the Respondent's facility wearing a tape recorder. The transcripts of these conversations show that Ellis told Stockson that he was looking for work. Stockson said there were no jobs posted. Ellis asked if he could leave a resume and Stockson said he would have to talk to Mailman about that, and Mailman was not there at the time. The next day Ellis came back and Stockson said that Mailman told him he had an opening for a laborer and Ellis could fill out an application if he was interested. Stockson said they had tied several times to call Ellis about this the day before. Ellis did not make an application, telling Stockson that "I'll contemplate it. Maybe I'll come back. If there's still an opening Monday I'll, ah, I'll take a look at it."

2. Analysis and concluding findings

On these facts the General Counsel argues that the Respondent refused to hire Ellis because of his known activity as an organizer for the Union. The General Counsel argues that Mailman must have known that Ellis was asking for a job during their January 30 and subsequent meetings, notwithstanding that Ellis did not say so.

Such an inference is not warranted on the facts here. Mailman knew that Ellis had taken a job as an organizer for the Union. In September and again in January Ellis told Mailman how much he liked the job. From this there is no reason for Mailman to have concluded that Ellis was looking for another job; on the other hand, as an organizer Ellis would reasonably check job availability of contractors in order to put union members to work. Such is implicit in the statement, "I was just wondering if you was looking to hire at all?"

The whole tenor of all these meetings was that of a union business agent visiting a contractor whom he knew and asking if there was work available. Nothing Ellis said could reasonably be construed as his having requested work for himself. Had Ellis in fact been seeking employment, it is more likely than not he would have said so. Finally, when he did ask for a job in September, he was offered the opportunity to apply and he declined. Such further suggests than Ellis was never an applicant for a job with the Respondent, express or implied.

I conclude that the basic predicate for the General Counsel's allegation has not been established. I conclude that Ellis never sought employment from the Respondent. Therefore, the Respondent could not have violated the Act by failing to hire him.

C. *The Hiring Procedure*

1. The facts

It is also alleged that the Respondent changed its hiring procedure with the publication of Bay Electric Co. Hiring Policies on January 1, 1994. This statement of hiring procedure was on Bay Electric stationary and states:

> The following written statement is the only hiring policy of Bay Electric Co. Inc. Bay Electric Co. Inc. will only accept applications, asked for and filled out in person by the applicant. We will only accept applications when there is an opening, we will refuse all applications, resume's and inquires when there are no openings for employment. Applications that are accepted will then be scheduled for an appointment with Don Mailman who is the sole person for hiring Bay Electric Co. employees. Employees will be hired strictly on a merit basis to fit the position that is open. [Sic.]

2. Analysis and concluding findings

It is alleged that the Respondent promulgated and maintained this policy "to discourage employees and job applicant from forming, joining or assisting the Union or engaging in other concerted activities." The General Counsel offered no evidence to prove this assertion other than the fact 1 year later, and on subsequent visits, Ellis was not offered an application for employment.

As noted above, since Ellis did not ask for a job or otherwise indicate he was seeking employment, for Mailman not to have volunteered an application is scarcely a violation of the Act. Nor is the policy as written on its face a violation of the Act.

Finally, the policy as written was essentially that set forth in a letter from Mailman to Nest dated November 16, 1993, in response to Nest have sent the Respondent 13 unsolicited resumes. Thus the complaint allegation that the Union did not know of the Respondent's hiring policy until May 1995 is not supported by the record evidence. As the charge on which this allegation is based was filed on May 3, 1995,

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[3] Two versions of the transcript were submitted following the close of the hearing. Tr. A, which counsel for the General Counsel argues for and Tr. B, the version suggested by the Respondent. Tr. A is six pages. On p. 4 is the following:

DM: Take care, Gene.

GE: You too. Good to see you.

DM: We'll be in touch.

GE: All right.

Then the transcript continues but appears to pick up in the middle of a conversation between Mailman and Ellis. Tr. B ends with the quoted section. I conclude that it does not matter to the outcome of this case which version is considered; however, Tr. B is more likely the entire January 30 dialogue, with the remainder contained in Tr. A left over from the September meeting between Mailman and Ellis. The testimony of Ellis about the September meeting is similar to the statements in this portion of the transcript, and the quoted section seems to be an ending. Ellis testified that he generally taped his discussions, but would "reuse the tape if it was an innocuous, friendly conversation."

Section 10(b) would foreclose finding a violation based on promulgation of the policy on January 1, 1994. As with Nest and Smith allegations, Section 10(b) was not plead as a defense, but it was anticipated with the allegation that the period did not begin to run for 16 months after promulgation of the hiring procedure, which was denied, and counsel for the Respondent raised it at the hearing.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The complaints in Cases 1–CA–31620 and 1–CA–32903 are dismissed in their entirety.

[4]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.